> the privilege of expressing his views. Indeed, the State in many instances serves as a collection agency for private charities. These fees simply do not sustain the essential flow of revenue to the government; rather, these fees are linked to some regulatory scheme -- if not a charitable scheme. While these statutes have been passed by the legislature, they do not appear to have been passed for primarily revenue producing measures from the constitutional analysis above. In addition, these fees cannot in any manner be construed to be for the benefit for the entire community, rather they are for the benefit of those funds and charities that profit from the sale of these plates. Furthermore, it would be the first time in this Court's memory that people have actively pursued and volunteered to be subjected to a tax as those who seek specialty plates would be seen to be doing if the Court accepted the State's position. Thus, there is no likelihood of success on the merits based on the Tax Injunction Act.

281 F. Supp. 2d at 874 (A-66-67).

The court of appeals reversed. The court began by observing that "the TIA would not deprive federal courts of jurisdiction if (a) the 'fees' charged by the state are not taxes for purposes of TIA, or if (b) *Hibbs v. Winn*, 542 U.S. 88 (2004), can be read to encompass this suit," writing that "reasonable minds can differ on *both* questions." 407 F.3d at 354 (A-6) (parallel citations omitted) (emphasis added). The court concluded, however, that the charges for special license plates are taxes because "A dominant feature of the program, evidenced in over half of the provisions authorizing specialty license plates, is to raise revenue ." *Id.* at 358 (A-13). The court of appeals nowhere concluded, however, that enjoining the charges assessed for special license plates might result in any of the consequences the TIA was designed to protect

against: "state tax administration" would not "be thrown into disarray," taxpayers would not "escape the ordinary procedural requirements imposed by state law," nor would "the collection of revenue under the challenged law . . . be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency." *California v. Grace Brethren Church*, 457 U.S. 393, 410 (1982) (citation omitted).

The court of appeals denied a petition for rehearing *en banc* by an equally divided vote, with eight Circuit Judges voting to grant rehearing. The dissenting judges joined an opinion written by Judge Davis, which took the view that the court's decision applied the distinction between a tax under the TIA and a fee falling outside the TIA mechanistically and with an absurd result.

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals extends the jurisdictional bar of the Tax Injunction Act in a sweeping manner that risks eliminating federal court jurisdiction in a wide range of constitutional cases. First, the decision of the court of appeals is in direct conflict with the decision of the United States Court of Appeals for the Sixth Circuit in *ACLU of Tennessee v. Bredesen*, --- F.3d ---, No. 04-6393, 2006 WL 664372 (6th Cir. Mar. 17, 2006), in which that court held that the statutory payment required by Tennessee to obtain a "Choose Life" license plate was not a "tax" under the TIA because the payment "is merely a contract price." *Id* at *4.[4] The Sixth Circuit expressly rejected the Fifth Circuit's reasoning in *Henderson*, instead embracing the views of the eight Circuit Judges who dissented from rehearing *en banc*

---

[4] Like the Louisiana "Choose Life" license plate statute considered by the court of appeals for the Fifth Circuit in the instant case, the Tennessee statute at issue in *Bredesen* required an additional fee (in Tennessee, $35.00), half of which goes to organizations opposed to abortion. *Id.* at *1.

below. *Id.* In addition to this direct conflict, the opinion of the Fifth Circuit is also at odds with the Fourth Circuit's opinion in *Planned Parenthood of South Carolina v. Rose*, 361 F.3d 786 (4th Cir. 2004), *cert. denied*, 543 U.S. 1119 (2005), which affirmed an injunction against South Carolina's "Choose Life" license plate statute without even pausing to address whether the TIA was a jurisdictional impediment.[5] These conflicts between the exercise of federal jurisdiction by two court of appeals (the Sixth and Fourth Circuits) over an important First Amendment issue, and the rejection of federal jurisdiction by another (the Fifth) in order to avoid confronting the same First Amendment issue, should be resolved by the Court. *See* Sup. Ct. R. 10(a).

Second, the court of appeals ignored the Congressional intent in enacting the TIA, incorporated into and recognized in *Hibbs v. Winn*, 542 U.S. 88 (2004), and many other of this Court's decisions, *viz.*, to prevent state taxpayers from using the federal courts "to stop the tax collector from initiating collection proceedings." *Id.* at 104 (quoting *Jefferson County v. Acker*, 527 U.S. 423, 435 (1999)). Instead, the court of appeals applied the TIA to bar Plaintiffs' suit to enjoin the operation by Louisiana of a viewpoint-discriminatory forum on its license plates, which incidentally involves the collection of fees collected from those who want to express certain state-approved messages on their license plates. The conflict between the Court's decision in *Hibbs*, as well as its prior opinions uniformly applying the TIA only to suits by

---

[5] Indeed, several challenges to "Choose Life" license plates have been brought in federal court, reflecting the enactment of such statutes in 12 states and the concomitant rejection of any other viewpoints about abortion for inclusion in state license plate programs. For example, in reliance upon the instant decision of the court of appeals, a federal district court in Oklahoma has dismissed on TIA grounds a First Amendment challenge to that state's "Choose Life" license plate. *Hill v. Kemp*, No. 04-CV-0028, slip. op. (N.D. Okla. Aug. 16, 2005), *appeal pending*, No. 05-5160 (10th Cir. docketed Sept. 15, 2005).

taxpayers seeking to avoid payment of state taxes, merits granting the petition. *See* Sup. Ct. R. 10(c).

Third, the court of appeals vastly broadened the scope of what constitutes a "tax" under the TIA by finding that small payments made by individuals who choose to use the prestige license plates forum to express their own views are "taxes." This is an unprecedented expansion of the TIA, which has heretofore been understood only "to stop taxpayers, with the aid of a federal injunction, from withholding large [tax] sums, thereby disrupting state government finances." *Hibbs*, 542 U.S. at 104. *See Henderson*, 434 F.3d at 357 (Higginbotham, J., dissenting) (decrying court's "'expansive reading' of 'tax'" under the TIA as an "aggressive run with the statute" which "create[s] a side door for federal judges determined to avoid a constitutional question") (A-83).

Under the expanded interpretation of the TIA by the court of appeals, nearly any unconstitutional content or viewpoint discrimination implemented by a state could be insulated from direct federal court review by including the "feature" of "taxing" those with messages with privileged content or viewpoint. *See Henderson*, 407 F.3d at 352 ("The program diverts excess charges over handling and ordinary registration fees for the plates to organizations endorsed by the legislature. *Because of this feature of the program*, we conclude that we lack jurisdiction over the case because of the Tax Injunction Act.") (emphasis added) (A-1). For example, a state could enact a statute allowing only those expressing approval of state policies and sitting state officials to speak in public (or even private) places, and then insulate that statute from federal court review by including a "feature" in its censorship: charging those who wished to speak approvingly of state policies and officials a nominal fee that would go "to organizations endorsed by the legislature." *Id.* Because whether such a voluntary entry fee into a state-controlled forum is a "tax" that triggers the TIA is an important question of federal law with far-reaching

implications for the traditional role of the federal district courts in adjudicating federal constitutional rights, this Court should grant the petition to settle whether such a voluntary entry fee is a "tax." *See* Sup Ct. R. 10(c).

I. The Decision of the Court of Appeals Conflicts with the Decision of the United States Court of Appeals for the Sixth Circuit Holding that the Tax Injunction Act Is Inapplicable to a Challenge to a "Choose Life" License Plate.

The decision of the court of appeals below presents a direct conflict with the recent decision of the court of appeals for the Sixth Circuit in *Bredesen*, 2006 WL 664372 (6th Cir. Mar. 17, 2006). In *Bredesen*, the Sixth Circuit held that the TIA does not deprive a federal district court of jurisdiction over a First Amendment challenge to Tennessee's "Choose Life" license plate statute because "Tennessee's sale of specialty plates creates contractual debts to pay but imposes no tax." *Id.* at *3. Relying in part upon this Court's decision in *New Jersey v. Anderson*, 203 U.S. 483, 492 (1906); *Meriwether v. Garrett*, 102 U.S. 472, 513 (1880); and *Fla. Cent. & Peninsular R.R. Co. v. Reynolds*, 183 U.S. 471, 475 (1902), the Sixth Circuit reasoned that "Ordinary purchase payments are not taxes under the TIA, and neither is the extra payment for a specialty license plate." *Bredesen*, at *2. Expressly rejecting the tax-vs.-fee analysis undertaken by the Fifth Circuit below, the Sixth Circuit held that the essential first step in determining whether a payment is a "tax" under the TIA is whether the payment is *compelled*. If the payment is *not* compelled, "The test for determining which compelled exactions are taxes and which are fees cannot logically be used to determine whether a payment is a compelled exaction in the first place." *Id.* at *4. Instead, the Sixth Circuit acknowledged its "substantial agreement" with the opinion of Judge Davis below, joined by seven other Circuit Judges, in dissent from denial of rehearing *en banc*. *Id.* The opinion of the Fifth Circuit thus presents an unusually sharp conflict

with an opinion of the Sixth Circuit on an important question of federal jurisdiction and the power of federal district courts to address important constitutional questions. *See also Bredesen* at *10 n.1 (Martin, J., concurring in part & dissenting in part) ("Perhaps of some interest, when this opinion is filed, at least three circuits (4th, 5th, and 6th) will have spoken on the issue [of "Choose Life" license plates], reaching at least three different conclusions, via at least sixteen separate opinions.").

The opinion of the Fifth Circuit is also at odds with that of the Fourth Circuit in *Planned Parenthood of South Carolina v. Rose*, 361 F.3d 786 (4th Cir. 2004). There, the court affirmed a district court decision enjoining South Carolina's "Choose Life" special license plate. The Fourth Circuit exercised jurisdiction over the exact issue over which the Fifth Circuit below held that the district court lacked jurisdiction due to the TIA. Indeed, the Fourth Circuit expressly characterized the monetary payment required under the South Carolina statute as a fee rather than a tax. *Id.* at 788 ("Sale of the Choose Life plate is expected to generate additional revenue for the State; the fee for the special plate is seventy dollars every two years in addition to the regular fee."). *See also Sons of Confederate Veterans, Inc. v. Commissioner, Va. Dept. of Motor Vehicles*, 288 F.3d 610, 619 (4th Cir. 2002) (exercising jurisdiction over challenge to statute forbidding display of organization's logo on special license plate, and describing charge for license plate as "fees collected through the special plate program" which have a "revenue-producing aim"); *id.* at 620 n.8 ("To obtain a special plate, the government requires a vehicle owner to pay a fee in excess of that required to obtain an ordinary Virginia license plate."); *Women's Resource Network v. Gourley*, 305 F. Supp. 2d. 1145 (E.D. Ca. 2004) (TIA does not bar claim that California special license plate scheme violates First Amendment).

This Court should grant certiorari to resolve the conflict between the Fifth and Sixth Circuits about the scope of the TIA. As set forth in greater detail in Point III below, this is an important question of federal law because the holding of the Fifth Circuit will enable states to avoid direct federal court review of unconstitutional statutes by attaching a monetary payment to those statutes.

II. The Decision of the Court of Appeals Conflicts with this Court's Decision in *Hibbs v. Winn*, 542 U.S. 88 (2004), Because It Construes the Tax Injunction Act to Bar Plaintiffs' Suit, Even Though They Do Not Contest Their Own State Tax Liability.

In *Hibbs v. Winn*, 542 U.S. 88 (2004), this Court described the limited scope of the TIA, noting that "[t]hird-party suits not seeking to stop the collection (or contest the validity) of a tax *imposed on plaintiff*. . . were outside Congress' purview." *Id.* at 104 (citations omitted). Because the plaintiffs here do not seek to stop the collection or contest the validity of any taxes imposed on the plaintiffs, this case is "outside Congress' purview" and federal court jurisdiction is not barred by the TIA.[6] *See Bredesen*, at *2 n.1 ("Plaintiffs in this case are of course not seeking to avoid paying for a 'Choose Life' license plate, and it is therefore at least questionable [under *Hibbs*] whether the TIA would apply even if the payment for the license plate were a 'tax.'").

Hibbs considered the scope of the Tax Injunction Act in an Establishment Clause challenge to an Arizona program that provided tax credits for payments of tuition to private schools. *Hibbs* held that federal court jurisdiction is not barred in such a suit. In reaching this holding, the Court

---

[6] In fact, the plaintiffs do not even contest the monetary fees charged for participation in the specialty license plate program. Instead, the plaintiffs challenge the program itself, in which the fees are incidental.

considered the history and purpose of the Tax Injunction Act, finding that:

> [I]n enacting the TIA, Congress trained its attention *on taxpayers who sought to avoid paying their tax bill* by pursuing a challenge route other than the one specified by the taxing authority. Nowhere does the legislative history announce a sweeping congressional direction to prevent "federal-court interference with all aspects of state tax administration."

Hibbs, 542 U.S. at 104-05 (quoting Brief of Petitioners) (emphasis added).

In reliance upon this Congressional intent and the cases this Court has decided involving the TIA, this Court summarized its TIA precedents as follows:

> In sum, this Court has interpreted and applied the TIA *only* in cases Congress wrote the Act to address, *i.e.*, cases in which state taxpayers seek federal-court orders enabling them to avoid paying state taxes.

Id. at 107 (first emphasis added). Thus, when considering whether the TIA's jurisdictional bar was removed because there was no adequate state remedy, this Court has looked at whether state courts provide a remedy for *taxpayers*. *Hibbs*, 542 U.S. at 107 ("The [state court] remedy inspected in our decisions was not one designed for the universe of plaintiffs who sue the State. Rather, it was a remedy tailor-made for taxpayers.").

The court of appeals, ignoring this Court's precedent, applied the TIA to bar federal district court jurisdiction over Plaintiffs' suit, even though no Plaintiff seeks a federal-court order "enabling [her] to avoid paying state taxes." Simply put, Plaintiffs' lawsuit is not an effort "to test state tax assessments," *California v. Grace Brethren Church*, 457

U.S. 393, 410 (1982) (quoting *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 108-109 n.6 (1981)), that would be encompassed within the TIA's jurisdictional bar.

The holding of the court of appeals extending the TIA to Plaintiffs' lawsuit therefore conflicts both with this Court's uniform and consistent application of the TIA to actions by state taxpayers to avoid state tax liability and with the Congressional intent in enacting the TIA as well.

III. The Decision of the Court of Appeals Presents An Important Question Concerning the Definition of "Tax" Under the Tax Injunction Act Which Has Not, But Should Be, Decided By this Court.

As the dissenting opinion of Judge Davis, joined by seven other Circuit Judges, observes, the payments made by individuals in order to obtain Louisiana prestige license plates bear none of the hallmarks of a tax:

> First, the payment in question does not "sustain the essential flow of revenue to the government" because in most cases the funds collected are not retained by the state. Second, the charge is not "imposed" by the legislature; because it is entirely optional and voluntary on the part of Louisiana citizens electing to pay the extra charge for a specialty plate. Third, the payment does not provide a "benefit for the entire community" because the fee from most specialty license plates is dedicated entirely to the specific organization or cause identified on the selected license plate.

Henderson, 434 F.3d at 356 (Davis, J., dissenting) (A-81).

In holding that the small payments involved in the Louisiana prestige license plate scheme are "taxes," the court of appeals not only rejected this sound reasoning, but transformed the TIA into something pernicious: a means by

which states can insulate many unconstitutional statutes from direct federal court review by including some form of monetary payment in them. For example, a state could allow parade permits only for organizations with favored viewpoints and simultaneously curtail federal court review by requiring small monetary permit fees. Under the court of appeals' theory, such fees would be "taxes" protected from direct federal review by the TIA's jurisdictional bar so long as the permit fees made their way into the state treasury.[7] This distorts the purpose of the TIA, which is to protect state taxation systems from being "thrown into disarray" by federal court interference, *Grace Brethren*, 457 U.S. at 410 (quoting *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 108-109 n.6 (1981)), not to provide states with a ready tool by which to defeat federal court jurisdiction over important federal questions like compliance with the First Amendment's requirement of viewpoint neutrality.[8]

---

[7] Moreover, it is readily apparent that such parade permit fees -- like the charges for Louisiana prestige license plates -- are hardly the sort of monetary assessments that "state taxpayers" would sue to avoid paying. On the contrary: because these charges are eminently voluntary, and are paid only when someone wishes to express a preferred viewpoint, it is difficult to imagine that someone paying to obtain, for example, a "Choose Life" license plate would sue to prevent collection of the fee at all, let alone on federal law grounds. One useful indicator of whether a payment to the state is a "tax" is surely whether anyone asked to pay it would ever resist payment.

[8] The court of appeals also improperly gave no weight to the characterization of the charges for special license plates within Louisiana's own legal system. *See Henderson*, 407 F.3d at 356 ("what is a 'tax' for purposes of the TIA is a question of federal law on which a state's legislative label has *no bearing*.") (emphasis added) (A-9). As the district court observed,

> the Louisiana Constitution provides, "The levy of a new tax, an increase in an existing tax, or a repeal of an existing tax exemption shall require the enactment of a law by two-thirds

In addition, the holding of the court of appeals ignores the essence of Plaintiffs' viewpoint discrimination claim. Plaintiffs would challenge the prestige license plate forum as viewpoint discriminatory even if the prestige license plates were available at no additional charge. Indeed, Plaintiffs would have no objection to paying a fair price for a pro-choice license plate if only Louisiana would allow expression of that viewpoint.

---

of the elected members of each house of the legislature." La. Const. art. VII, § 2. There is no indication that any of these measures had to be enacted by super-majorities. Furthermore, under the Constitution, bills concerning "the levying or authorizing of a new tax, increasing an existing tax, legislating with regard to tax exemption, exclusions, deductions, reductions, repeal or credits" must occur during even-numbered years. La. Const. art. III, § 2(A)(3). A general review of these statutes indicates they were not passed in those years.

281 F. Supp. 2d at 873 (A-65). *Cf. Hibbs*, 542 U.S. at 125-26 (Kennedy, J., dissenting) (treating the question of what is interference with a state tax system as determined in part by state law).

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

SIMON HELLER
(*Counsel of Record*)
PRISCILLA J. SMITH
Center for Reproductive Rights
120 Wall Street, 14th Floor
New York, NY 10005
(917) 637-3600

WILLIAM E. RITTENBERG
Rittenberg & Samuel, L.L.C.
715 Girod St., Ste. 200
New Orleans, LA 70130
(504) 524-5555

Counsel for Petitioners

Dated March 20, 2006.

me Court, U.S.
FILED
05-1222 MAR 21 2006
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DOREEN KEELER; and
PLANNED PARENTHOOD OF LOUISIANA, INC.,

Petitioners,

— v. —

RICHARD L. STALDER, Secretary, Department of Public Safety and Corrections; and JOHN KENNEDY, State Treasurer,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

WILLIAM E. RITTENBERG
Rittenberg & Samuel, L.L.C.
715 Girod St., Ste. 200
New Orleans, LA 70130
(504) 524-5555

SIMON HELLER
(Counsel of Record)
PRISCILLA J. SMITH
The Center for Reproductive Rights
120 Wall Street, 14th Floor
New York, NY 10005
(917) 637-3600

Counsel for Petitioners

Table of Contents

Appendix Page

Henderson v. Stalder,
407 F.3d 351 (5th Cir. 2005) A-1

Henderson v. Stalder,
265 F.Supp.2d 699 (E.D.La. 2003) A-17

Henderson v. Stalder,
281 F.Supp.2d 866 (E.D.La. 2003) A-55

Henderson v. Stalder, 434 F.3d 352 (5th Cir. 2005) A-75

U.S. Const. amend. I A-84

U.S. Const. amend. XIV A-84

28 U.S.C. § 1341 ("Tax Injunction Act") A-85

LA. REV. STAT. §§ 47:463.3, 47:463.8-463.9, 47:463.12, 47:463.14, 47:463.22-463.24, 47:463.28, 47:463.30-463.33, 47:463.36-463.37, 47:463.39-463.41, 47:463.43-463.54, 47:463.56-463.64, 47:463.66-463.110 ..... A-86

United States Court of Appeals,
For The Fifth Circuit.

No. 03-30699.

Russell J. HENDERSON; et al.,
Plaintiffs,

Doreen Keeler; Planned Parenthood of Louisiana, Inc.,
Plaintiffs-Appellees,

v.

Richard STALDER, etc.; et al.,
Defendants,

Richard Stalder, Secretary, Department of Public Safety and Corrections; John Kennedy, State Treasurer,
Defendants-Appellants.

April 13, 2005.

Appeal from the United States District Court
for the Eastern District of Louisiana
New Orleans Division No. 00-CV-2237-K

Before JOLLY, JONES and PRADO, Circuit Judges.

EDITH H. JONES, Circuit Judge:

This appeal concerns whether Louisiana's prestige license plate program facially discriminates against pro-choice views in contravention of the First Amendment. The program diverts excess charges over handling and ordinary registration fees for the plates to organizations endorsed by the

legislature. Because of this feature of the program, we conclude that we lack jurisdiction over the case because of the Tax Injunction Act, 28 U.S.C. § 1341.

I. BACKGROUND

A. The First Appeal

This case is on appeal for the second time. The plaintiffs originally filed suit seeking to have La.Rev.Stat. Ann. § 47:463.61, which authorized the adoption of a "Choose Life" prestige license plate, declared unconstitutional. The district court found Louisiana's prestige license plate program created a forum for speech that was not viewpoint neutral, granted both declaratory and injunctive relief, and certified the case for interlocutory appellate review. *See Henderson v. Stalder* ("*Henderson I*"), 112 F.Supp.2d 589 (E.D.La.2000).

On appeal, this court, sua sponte, concluded that the plaintiffs lacked standing. *See Henderson v. Stalder,* 287 F.3d 374 (5th Cir.2002). *See also, Women's Emergency Network v. Bush,* 323 F.3d 937 (11th Cir.2003) (rejecting challenge to Florida "Choose Life" plate for lack of standing). The court thus "REVERSED, VACATED, and REMANDED" the case "for an entry of dismissal." *Henderson,* 287 F.3d at 382. On petition for rehearing, however, the court slightly amended its decision by issuing an order, which reads in part: "The petition for rehearing is DENIED. The case is remanded to the district court with instructions to dismiss the case for lack of standing unless *the plaintiff Keeler* amends her petition within a reasonable time to challenge the state's overall policy and practice of issuing specialty license plates." *Henderson v. Stalder,* 57 Fed. Appx. 213, 2003 WL 151183 (5th Cir. Jan.9, 2003) (unpublished order) (emphasis added). The district court vacated the previous judgment and allowed Keeler to amend her complaint.

B. Remand

The Third Amended Complaint named individuals Henderson, Keeler, Loewy, and LaMothe, and organizations (National Council of Jewish Women and Planned Parenthood of Louisiana) as plaintiffs, and each attempted to establish standing. *See Henderson v. Stalder* ("*Henderson II*"), 265 F.Supp.2d 699, 707 (E.D.La.2003). Importantly, the Third Amended Complaint "raise[d] a First Amendment facial challenge to the entire overall policy and practice under which Louisiana makes available certain specially designed license plates for the expression of certain views by Louisiana vehicle owners." *Id.* The Third Amended Complaint also raised new Establishment Clause claims.

The defendants moved to dismiss on several grounds, and the plaintiffs responded with a motion for partial summary judgment contesting the constitutionality of the license plate program.

The district court first determined that the Fifth Circuit's mandate did not prevent each of the plaintiffs from attempting to reassert standing. *See id.* at 708-09. Nevertheless, the district court dismissed all the plaintiffs, save Keeler and PPL, for lack of standing based on the reasoning the Fifth Circuit provided. *See id.* at 709-10.[1] As to Keeler, the court concluded that she sufficiently amended her complaint to present a viable facial challenge to the overall program. The district court also concluded that the amendments to Keeler's complaint cured the redressability problems that were fatal to PPL's funding claim. Furthermore, the district court dispatched the defendants' argument that the Tax Injunction Act barred the challenge. *See id.* at 720 n. 12.

---

[1] Plaintiffs Henderson, Loewy, LaMotte and the NCJW have not appealed the district court's dismissal of their claims.

On the merits of Keeler's First Amendment claim, the court again accepted Keeler's argument that the license plate program created a "forum" that permitted only some groups to express their chosen viewpoint. Relying on the Fourth Circuit's decision in *Sons of Confederate Veterans, Inc. v. Commissioner, Virginia Dept. of Motor Vehicles* ("*SCV*"), 288 F.3d 610 (4th Cir.2002), *reh'g en banc denied,* 305 F.3d 241 (4th Cir.2002), the district court held that Louisiana's prestige license plate program effectuated unconstitutional viewpoint discrimination and enjoined its enforcement.[2] The court refused to stay the enforcement of its ruling. This appeal ensued.

II. STANDARD OF REVIEW

We review the district court's grant of summary judgment de novo, applying the same standards as did the district court. *Hodges v. Delta Airlines, Inc.,* 44 F.3d 334, 335 (5th Cir.1995) (en banc).

III. DISCUSSION

The defendants raise three principal arguments on appeal: (1) the district court exceeded the scope of its mandate by allowing PPL to amend its claim; (2) the Tax Injunction Act bars the suit in its entirety; and (3) the prestige license plate program does not violate the First Amendment. For reasons that will be obvious, we do not reach the merits of the case.

A. PPL's Standing

The defendants rightly contend that the district court exceeded the scope of this court's mandate by permitting PPL to seek to file a complaint on remand. "[T]he mandate rule compels compliance on remand with the dictates of a

---

[2] PPL's funding and Establishment Clause claims were therefore rendered moot. *See Henderson II,* 265 F.Supp.2d at 719.

superior court and forecloses relitigation of issues expressly or impliedly decided by the appellate court." *United States v. Lee,* 358 F.3d 315, 321 (5th Cir.2004) (citing *United States v. Bell,* 988 F.2d 247, 251 (1st Cir.1993)).

The district court failed to abide by this rule. "Where, as here, further proceedings in the district court are specified in the mandate of the Court of Appeals, the district court is limited to holding such as are directed." *Crowe v. Smith,* 261 F.3d 558, 562 (5th Cir.2001) (citations and quotations omitted). This court's order permitting Keeler to amend her complaint must be read in light of the original decision in which the case was remanded *only* for "entry of dismissal." *Henderson,* 287 F.3d at 382. This court narrowly altered that ruling on rehearing to permit *Keeler* to add a facial challenge to the entire program--a claim that was absent from her original complaint. This narrow amendment to the *Henderson* ruling was not an invitation for Keeler to add new claims or rationales for PPL's standing. The appellate court might have explored other avenues by which PPL could establish standing, and might have included remand instructions to that end, but we did neither. Judicial economy considerations--the district court's justification for its decision--are insufficient to overcome the appellate court's express ruling. PPL is therefore dismissed from the suit.

B. Tax Injunction Act

The defendants next contend that the Tax Injunction Act ("TIA") bars Keeler's First Amendment challenge to the prestige license plate program. The TIA prohibits a federal court from "enjoining, suspending or restraining the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such state." 28 U.S.C. § 1341. Keeler's goal in this suit, and the remedy ordered by the district court, in fact enjoined the state's collection of revenue for its entire

specialty license plate program. Nevertheless, the TIA would not deprive federal courts of jurisdiction if (a) the "fees" charged by the state are not taxes for purposes of TIA, or if (b) *Hibbs v. Winn,* 542 U.S. 88, 124 S.Ct. 2276, 159 L.Ed.2d 172 (2004) can be read to encompass this suit. Although reasonable minds can differ on both questions, we are persuaded that the additional amounts that the state collects for specialty plates--above handling and ordinary vehicle registration fees--are indeed taxes rather than regulatory fees. Further, *Hibbs*'s interpretation of the TIA does not contemplate or authorize a suit whose object is to diminish the flow of state revenues. The TIA deprives the federal courts of jurisdiction over Keeler's claim.

A review of the program's operation will illuminate further discussion. Under Louisiana Law, the Secretary of the Department of Public Safety and Corrections ("Secretary" and "DPS") is charged with the task of issuing license plates for private passenger vehicles. *See* La.Rev.Stat. Ann. § 47:463(A)(3)(a). This legislation also permits the Secretary to issue "special prestige license plates" if the Legislature so authorizes and certain administrative requirements are satisfied. *Id.* A few rudimentary administrative requirements apply to all prestige plates.[3]

Other varying preconditions are included in the specific legislation authorizing the individual prestige license plates. For instance, there are monetary differences. More than half of the specialty plates are distributed in exchange for

---

[3] *See, e.g.,* La.Rev.Stat. Ann. § 47:463(A)(3)(a) ("All prestige plates issued after August 15, 1999 shall include a handling charge of three dollars and fifty cents to offset the administrative costs of the department for the issuance of such plates."); La.Rev.Stat. Ann. § 47:463(A)(3)(b) ("No prestige plate shall be established after January 1, 2002, until the department has received a minimum of one thousand applications for such plate.").

additional charges above the handling charge, and in many cases, like that of the "Choose Life" plates, the charges so collected are distributed to organizations as determined by the legislature. *See Henderson I,* 112 F.Supp.2d at 592 (explaining that proceeds from "Choose Life" plates will be distributed to organizations that counsel women to place their children up for adoption). When such an additional charge is required, however, the amount varies from statute to statute. *See, e.g., id.* at § 47:463.8 (no fee); § 47:463.14 ($25 fee); § 47:463.20 (same fee as "the regular motor vehicle registration license fee"). Moreover, the extra charge may recur annually or may be a one-time charge. *See, e.g., id.* at § 47:463.8 (one-time charge); § 47:463.31 (annual charge). Second, the moniker associated with the extra fee also varies. *See, e.g., id.* at § 47:463.33 ("fee"); § 47:463.31 ("royalty"); § 47:463.57 ("donation"). Finally, the allocation of the proceeds differs from statute to statute. *See, e.g., id.* at § 47:463.8 (funds deposited in state treasury); § 47:463.43 (funds directed to Louisiana Environmental Education Fund); § 47:463.89 (funds directed to New Orleans Recreation Department).

Other distinctions less critical to this case exist among the statutes authorizing specialty plates. The statutes differ in the measure of editorial and aesthetic discretion afforded to the recipients and the Secretary.[4] Some, but not all, of the

---

[4] Louisiana appears to be deliberate about the measure of creative discretion it delegates to the identified groups and how much it retains. The legislature specifically adopted the "Choose Life" statement, allowing only aesthetic decisions to the Choose Life Council. To well-established organizations, the Legislature entrusts the design of the license plate, subject to compliance with certain statutory standards. *See, e.g.,* La.Rev.Stat. Ann. § 47:463.71 ("The license plate shall be of a color and design selected by the Boy Scouts of America, provided that it is in compliance with R.S. 47:463(A)(3).") In other instances, the state imposes more restrictive instructions. *See, e.g., id.* at § 47:463.75 ("In addition, the plate shall bear the inscription 'SONS OF CONFEDERATE

statutes require that a minimum number of purchasers apply for the specialty plates prior to their production. *See, e.g., id.* at § 47:463.13 (no minimum applicant requirement for special plates honoring Congressional Medal of Honor recipients); § 47:463.58 (conditioning the Life Center Full Gospel Baptist Cathedral plate on a minimum of one thousand applicants); § 47:463.61 (conditioning the "Choose Life" plate on a minimum of one hundred applicants). Finally, beyond administrative and monetary distinctions, the statutes mandate different eligibility criteria to obtain specialty plates.[5]

From Keeler's standpoint, the first basis for sustaining federal jurisdiction is that the additional charges Louisiana citizens incur for specialty plates, above the handling charges and ordinary vehicle registration taxes, are fees, not taxes, hence the program is not covered by the TIA. The district court so held, in part because the state statutes characterize

---

VETERANS' and the logo of the Sons of Confederate Veterans. The department shall approve any logo, symbol, or design before such plate is produced."). As for plates recognizing diffuse interests, Louisiana retains all content-based discretion. *See, e.g., id.* at § 47:463.112 ("The secretary shall design the plate [recognizing foster and adoptive parenting].").

[5] In some instances, eligibility is based on membership in a particular association or participation in a seminal event. *See, e.g., id.* at § 47:463.7 (former prisoners of war of World War I, World War II, the Korean Conflict, and the Vietnamese Conflict); § 47:463.13 (U.S. Reserve Forces); § 47:463.20 (Pearl Harbor survivors); § 47:463.22 (Shriners); § 47:463.32 (Knights of Columbus). Other plates express support for a particular institution or entity and therefore do not require membership in a particular organization. *See, e.g., id.* at § 47.463.67 ("I Support River Region Cancer Center"); § 47:463.110 ("Support 4-H Youth Development"). Still other plates allow citizens to express their support for a certain cause or point of view. *See, e.g., id.* at § 47:463.40 ("Think Safe Kids"); § 47:463.60 ("Animal Friendly"); § 463.61 ("Choose Life"); § 47:463.69 ("Don't Litter Louisiana"); § 47:463.95 ("Unlocking Autism").

the additional charges for the specialty plates as fees. On the contrary, what is a "tax" for purposes of the TIA is a question of federal law on which a state's legislative label has no bearing. *Home Builders Ass'n of Miss. Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1010 n. 10 (5th Cir.1998). While this court has acknowledged that "distinguishing a tax from a fee is often a difficult task," *id.* at 1011, Judge Wisdom distilled the following "workable distinctions" from the caselaw:

> The classic tax sustains the essential flow of revenue to the government, while the classic fee is linked to some regulatory scheme. The classic tax is imposed by a state or municipal legislature, while the classic fee is imposed by an agency upon those it regulates. The classic tax is designed to provide a benefit for the entire community, while the classic fee is designed to raise money to help defray an agency's regulatory expenses.

Home Builders, id. (omitting internal citations). This court added that a broad construction of "tax" is necessary to honor Congress's goals in promulgating the TIA, including that of preventing federally-based delays in the collection of public revenues by state and local governments. *Id.* (citing *Tramel v. Schrader*, 505 F.2d 1310, 1315-16 (5th Cir.1975)).

A few brief examples flesh out the distinction between a TIA-covered tax and regulatory fees. In *Hager v. City of West Peoria*, 84 F.3d 865 (7th Cir.1996), the Seventh Circuit held that graduated fees on the weight of truckloads had been legislated to discourage heavy trucks from using a particular road and thus "were passed to control certain activities, not to raise revenue." 84 F.3d at 871. This court has, on the other hand, routinely characterized local improvement assessments imposed on a selected class of business as taxes, not fees, in

line with the understanding that a "tax" "embraces any extraction of property from a private person by a sovereign for its use." *Tramel,* 505 F.2d at 1315. *Home Builders* reaffirmed this characterization of an impact fee ordinance, which was passed to enhance the provision of municipal services in a rapidly growing city, deeming it a tax in light of the broad public purpose to be served by the funds collected under it. 143 F.3d at 1011-12.

Acknowledging this tax/fee distinction, Keeler relies on *Neinast v. Texas,* 217 F.3d 275 (5th Cir.2000), in which this court found no TIA bar to adjudicating handicapped persons' challenge to a Texas statutory fee for obtaining handicapped parking placards. Revenue obtained from the fee was paid into the state highway fund for the purpose of defraying the cost of the handicapped placards. 217 F.3d at 278. The court characterized fees, exempt from the TIA, as charges imposed "(1) by an agency, not the legislature; (2) upon those it regulates, not the community as a whole; and (3) for the purpose of defraying regulatory costs, not simply for general revenue-raising purposes." *Id.* While the first two criteria tugged in opposite directions, the court held that the fee was tagged "for the benefit of the program itself," *i.e.,* to reimburse the costs of the placards. This fact served to distinguish *Home Builders.* Further, responding to an argument of the state, the court noted that "the question is not where the money is deposited [in general revenue or segregated accounts], but the purpose of the assessment." *Id.*

Keeler advances three reasons, allegedly rooted in *Neinast,* to support her contention that the specialty plate program involves the payment of fees. First, she contends that because the program is administered by the Motor Vehicle Unit of the Department of Public Safety and Corrections, the fees are "charged" by a regulatory agency. Second, the charges are imposed "only upon those that the scheme regulates," rather than upon the community as a